UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

STATE OF MAINE, *et al.*

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator, United States Environmental Protection Agency, *et al.*

Defendants and

PENOBSCOT NATION, *et al.*

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

MOTION OF THE PENOBSCOT NATION TO FILE COUNTERCLAIM

Intervenor, the Penobscot Nation (the "Tribe" or the "Nation"), hereby moves to amend its Answer to add a counterclaim against the Plaintiffs (collectively "Maine"). This counterclaim for declaratory and injunctive relief is the mirror image of Count II of Maine's Second Amended Complaint ("Maine's Count II"). It involves the establishment of a matter of critical importance to the Penobscot Nation: that the right of the Tribe to take fish for sustenance within its historic treaty reservation, as enshrined in the Maine Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6201 *et. seq.* ("MIA"), ratified and rendered effective by the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 *et. seq.* ("MICSA"), is an expressly retained sovereign right, protected under principles of federal Indian law as a treaty right. The Nation's counterclaim would establish that the Settlement Acts require Maine to recognize and protect this unique Penobscot sustenance fishing right within its reservation waters of the Main

Stem of the Penobscot River in any official action Maine takes to set water quality standards there. The Tribe's proposed Amended Answer with Counterclaim is attached hereto as Exh. A.

As set forth more fully below, the Penobscot Nation meets the liberal standard of FED. R. CIV. P. 15(a)(2) for the amendment of pleadings. The Nation must assert this counterclaim to protect its critical interests as a unique riverine Indian tribe that has relied upon the Penobscot River for sustenance fishing since time immemorial, a practice that is essential to its cultural survival. Circumstances have only recently unfolded that necessitate the bringing of this claim: (a) the prospect of Maine and EPA settling the issue without substantive involvement by the Tribe and (b) more recently, the prospect of EPA, under the Trump Administration, tacitly agreeing with Maine and reversing a course protective of these critical Penobscot interests.

MEMORANDUM OF LAW

BACKGROUND

I. The Penobscot Nation And Its Aboriginal Homeland On The Penobscot River

In settling the Tribe's historic land claims against the State of Maine pursuant to MICSA, Congress explained that "[t]he aboriginal territory of the Penobscot Nation is centered on the Penobscot River" and that is "riverine in [its] land-ownership orientation." S. REP. NO. 96-957 at 11 (1980) ("S. REP."); H.R. REP. NO. 96-1353 at 11 (1980) ("H.R. REP."), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3787. Congress further confirmed the right of Penobscot tribal members take fish "for their individual sustenance," within the Tribe's reservation. 30 M.R.S.A. § 6207(4), *ratified by* 25 U.S.C. § 1721(b).

The Penobscots have relied upon the resources of the Penobscot River for their physical and cultural survival from time immemorial; their sustenance practices in the River are their cultural practices. *See* Declaration of Harald E. Prins, Exh. B ("Prins Decl."); Declaration of Lorraine Dana, Exh. C ("L. Dana Decl.") at 1-3; Declaration of Christopher B. Francis, Exh. D

("C. Francis Decl.") at 1-2; Declaration of Barry Dana, Exh. E ("B. Dana Decl.") at 1. The fish that Penobscots eat are in the waters of the Penobscot River. L. Dana Decl. at 1; C. Francis Decl. at 1-2; B. Dana Decl. at 1. There are no waters on the surfaces of the islands to support fish, eel, and other Penobscot sustenance resources. B. Dana Decl. at 2 ¶12.

The Tribe's river-based subsistence fishing practices are imbedded in the Tribe's language, culture, traditions, and belief-systems, including its creation legends. Exhibit 2 to Prins Decl. at 3. Penobscot family names, *ntútem* (or "totems" in English), reflect the fish in the River: for example, *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch). Prins Decl. ¶4. *See also id.* (referring to Penobscot place names and fishing sites). These practices are not mere romantic notions of the distant past; they remain fundamental to who the Penobscots are. *See* C. Francis Decl. at 1-2; B. Dana Decl. ¶11. *See also* S.REP., 17; H.R.REP., 17 (the Settlement Act will not "lead to acculturation" but will protect the Nation's "cultural integrity"). Well into the 1990s, when understandings of contaminants suppressed their consumption, Penobscot families relied upon fish, eel, and other food sources from the River for up to four meals per week to the tune of two to three pounds per meal. C. Francis Decl. at ¶¶ 5-9; B. Dana Decl. ¶¶ 6-9.

II. Penobscot Treaties Ceding Upland Lands On Either Side of The River

On the eve of the Revolutionary War in 1775, the Provincial Congress in Boston resolved to protect the Tribe's aboriginal territory "beginning at the head of the tide of the Penobscot river and extending six miles on each side of said river" in exchange for the Tribe's pledge to support the Americans' war effort. WATERTOWN RESOLVE (1775), Exh. F. Nevertheless, "[t]he Penobscot Nation lost the bulk of its aboriginal territory in treaties [with Massachusetts] consummated in 1796 and 1818." H.R. REP., 12. In the 1796 treaty, the Penobscot Nation ceded its lands "on both sides of the River Penobscot" from the head of the tides "at Nichol's rock, so

called, and extending up the said River thirty miles." TREATY (1796), Exh. G. *See also* Prins Decl. ¶4(d) (describing Nichol's rock). In the 1818 treaty, the Nation ceded essentially the rest of its lands "on both sides of the River" from above the thirty mile stretch ceded in the 1796 treaty. TREATY (1818), Exh. H. In 1820, at the advent of Maine's statehood, Maine entered into a treaty with the Tribe to accede to its 1818 treaty cessions. TREATY (1820), Exh. I. The Penobscots' treaties ceded only uplands; they retained their use and occupation of the River to survive and they never intended otherwise. Prins Decl. ¶4(b); Exhibit 2 to Prins Decl. at 5-9.

III. The Nation's Land Claims, The Land Claims Settlement, And Fishing Rights

In *Joint Tribal Council v. Morton,* 388 F. Supp. 649 (D. Me. 1975), Judge Gignoux ordered the United States, as trustee for the Penobscot Nation and the Passamaquoddy Tribe, to commence a lawsuit challenging the validity of the Tribe's treaty cessions under the Indian Nonintercourse Act because the 1796 and 1818 treaties with Massachusetts and 1820 treaty with Maine were not approved by the federal government. *See* S.REP., 12-13.

Court decisions in 1979 confirming the application of federal Indian law to the Penobscot Nation and the Passamaquoddy Tribe and their treaty reservations drove Maine to "reevaluate the desirability of settlement." Jt. Legal Supp. Exh. 15 at 413-418. Congress explained that these decisions, one of which was *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061 (1st Cir. 1979) (Coffin, C. J.), established that the Tribe is "entitled to protection under federal Indian common law doctrines," and "possesses inherent sovereignty to the same extent as other tribes in the United States." S. REP., 13-14 (describing decisions); H.R. REP., 12 (same).

The resulting settlement was a tripartite agreement between the Penobscot Nation, Maine, and the United States. The Nation and the State agreed to jurisdictional terms. *See* MIA § 6202. Congress then ratified MIA and rendered it effective and extinguished the land claims. *See* MICSA §§1721-32. Maine provided no monetary consideration for the settlement, but

characterized as worthy consideration a concession that the Tribe would retain authority to exercise sustenance fishing under principles of federal Indian law. *See, e.g.,* Jt. Legal Supp. Exh. 15 at 417-418, 425, 436; Jt. Legal Supp. Exh. 39 at 1110; Exh. 15 at 417-418.

Addressing concerns about the settlement's impact on tribal fishing rights, Congress explained that those rights were "examples of expressly retained sovereign activities," protected under federal Indian common law doctrines in accord with *Bottomly.* S. REP., 13-17; H.R. REP., 13-17. Congress also addressed fears that the settlement "will lead to acculturation of the Maine Indians," promising that "[n]othing in the settlement provides for acculturation"; rather it "offer[ed] protection against" any disturbance of the Tribe's "cultural integrity" by confirming tribal self-governance. S. REP., 17; H.R. REP., 17. Congress then ratified the sustenance fishing provision quoted above. MIA §6207(4). *See* MICSA §1725 (b)(1) (ratifying MIA).

IV. EPA Decisions Disapproving Maine's Water Quality Standards

In the agency decisions challenged by Maine in this action, the Environmental Protection Agency ("EPA") disapproved Maine's water quality standards ("WQS") within the Penobscot reservation and trust lands with respect to human health criteria, because those criteria do not allow the Tribe to safely exercise its sustenance fishing right confirmed by Congress in MISCA. *See* ECF 30-1. In reaching this decision, the EPA recognized, in accord with well-established principles of federal Indian law, that this fishing right includes a right to water quality sufficient to allow the Nation to practice its subsistence riverine way of life, critical to its cultural survival. *See* ECF 30-1, PageID# 956. The EPA relied upon a formal 2015 opinion of the Solicitor of the United States Department of the Interior ("DOI"), in light of DOI's charge as the agency with administrative oversight of MISCA. *See* ECF 30-1, PageID#932, 957. In that opinion, attached as Exhibit J, DOI concluded, amongst other things, that

> Fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. . . . The [federal] trust relationship counsels protection of tribal fishing rights in Maine.

Exhibit J at 10.[1] Guided by DOI's opinion, the EPA disapproved certain of Maine's WQS because they did not adequately protect the ability of Penobscots and other tribes to take fish from tribal waters, including the Nation's reservation waters in the Main Stem, for sustenance. *See* ECF 30-1, PageID# 930-32, 956-57, 963-73.

V. Relevant Procedural History And Events Stalling This Case

Maine initially sued EPA in July 2014 for failure to timely approve or disapprove its surface water quality standards ("WQS"). ECF 1, 7. Its lawsuit was rendered moot in early 2015, however, when EPA issued the above-referenced decision to formally approve the bulk of Maine's standards, but to disapprove those it found insufficiently protective of tribal sustenance fishing rights in tribal waters. *See* ECF 22, 26. Rather than revise its WQS to protect those rights in accord with EPA's decision, Maine instead amended its complaint to challenge EPA's disapprovals. ECF 30. In the meantime, because Maine failed to correct its WQS, EPA promulgated federal replacement WQS as required by the CWA to protect tribal sustenance fishing rights. *See* ECF 62. Public comments overwhelmingly supported EPA's proposed WQS, 81 Fed. Reg. at 92,475. EPA published the final rule in the Federal Register on December 19, 2016, and it became effective on January 18, 2017. *Id.* at 92,466; ECF 62.

In the wake of Donald Trump's inauguration, Maine embarked on efforts to undo the work of the Obama Administration in protecting the water quality of the Penobscot Nation's

[1] Last year, the en banc Ninth Circuit applied the same case law underpinning DOI's opinion to hold that a treaty agreement providing for Indian tribes' right "to take fish," even without the qualifier "for sustenance" as in MIA § 6207(4), included an agreement that "*there would be fish sufficient to sustain them.*" *United States v. Washington,* 853 F.3d 946, 964 (9th Cir. 2017) (en banc) (emphasis added).

reservation sustenance fishery and that of other Maine tribes. In February, 2017, it petitioned then EPA Administrator Scott Pruitt to reverse course, ECF 93-1, leading to a seven month stay of this case between May and December, 2017, *see* ECF 103 PageID# 3514; ECF 109. That effort proved unsuccessful. "After careful consideration," EPA reported to this Court, it decided "not to withdraw or otherwise change any of the decisions that are challenged in this case." *Id.* PageID#3526.

More recently, however, Maine has met with success. On the brink of EPA filing a brief to defend its disapprovals of Maine's WQS under the guiding federal Indian law rationale provided by DOI, Maine apparently persuaded EPA not to file that brief, but instead to engage in settlement discussions that excluded the Penobscot Nation and other affected tribes. *See* ECF 132 (Maine and EPA joint motion to stay briefing); ECF 136 PageID#3710 (EPA asserting that Nation's "participation and agreement is not required to a settlement that does resolve its claims or impose any obligations upon it"); ECF 137 PageID#3713 (Maine incorporating ECF 136).[2]

In a telephone conference held on June 27, 2018, EPA representatives apprised Penobscot Nation representatives of the decision of EPA and Maine to engage in settlement discussions without substantive involvement by the Penobscot Nation. Declaration of Kirk Francis, Exhibit K ("K. Francis Decl."). In that call, Penobscot Chief Kirk Francis informed EPA that recognition of the Nation's sustenance fishing right as, in essence, a treaty right, under established principles of federal Indian law would have to be a "lynchpin" of any settlement that the Penobscot Nation would agree to. K. Francis Decl. EPA Regional Administrator, Alexandra Dunn, stated on the call that, though she could provide few details about the settlement, EPA and Maine would endeavor to avoid treating the Nation's sustenance fishing right as a treaty or

[2] Maine filed its opening merits brief in accord with the Scheduling Order on February 16, 2018. ECF 118. EPA's merits brief would have been due on June 28, 2018. ECF 117; ECF 131.

aboriginal right under principles of federal Indian law. *Id.*

In a telephone conference held on July 27, 2018, EPA representatives apprised Penobscot Nation representatives that settlement discussions with Maine had not proven fruitful, but that EPA had decided to ask the Court for a continuing stay of this case while it further requests that the Court allow it to remand its decisions at issue to itself in order to revise them. K. Francis Decl. The EPA then filed a related motion. *See* ECF 139.

ARGUMENT

Whatever becomes of EPA's motion for voluntary remand (which the Penobscot Nation intends to oppose), the Nation and Maine have a continuing controversy about a central issue involving their modern-day treaty, the Settlement Acts: whether, when Maine promulgates water quality standards within the Nation's reservation sustenance fishery, the Nation's MISCA-confirmed right to engage in sustenance fishing carries with it a right to water quality to ensure that there will be fish of sufficient quality and quantity to safely sustain the Penobscot people, physically and culturally. The Penobscot Nation should be entitled to litigate that ripe controversy now and not have that critical question settled out from under it by Maine and EPA (to the extent they continue efforts to resolve this case), or left wholly unresolved whether EPA attains a remand of its agency decisions or not.

Under Rule 15(a)(2), leave to amend "should be freely give[n] when justice so requires" FED.R.CIV. P. 15(a)(2). As the Supreme Court has famously stated, "this mandate is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits" absent such things as "undue prejudice to the opposing party," the "futility of amendment," "undue delay, bad faith, or dilatory motive." *Foman v. Davis,* 371 U.S. 178, 182 (1962).

None of the factors weighing against granting leave to amend are present here. Generally, prejudice to the opposing party is the most critical factor in the "freely give[n]" determination. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). There is no prejudice to any other party to this action by the introduction of the Nation's counterclaim; for it does nothing more than seek the opposite declarations to those of Maine's Count II on the same legal issues. *Compare* ECF 30 PageID# 916-918, 920-922 *with* Exh. A at 31-43. Maine already briefed the issues in February. *See* ECF 118 PageID# 3569-70 & n.4 (Maine "seeks declaratory relief" under Count II). And EPA had its brief ready on the issues just two days before it was due on June 28, 2018, *see* ECF 130 (EPA representing on 6/18/18 that it "has worked diligently to meet the current June 21, 2018 filing deadline, but needs an additional week); ECF 132 (EPA and Maine joint motion for stay filed 6/26/18). Thus, allowing the Nation to bring its counterclaim and proceeding to the merits of that counterclaim and Maine's Count II will not prejudice the State or EPA. Rather, it will resolve a fundamental controversy regarding the Nation's sustenance fishing rights under MICSA, a treaty to which it is a party.[3]

Undue delay is also not present here. The Penobscot Nation learned for the first time on June 26, 2018 that EPA and Maine had jointly decided to (a) put this case in abeyance to avoid EPA filing a merits brief to defend its decisions and the interpretation of federal Indian law principles undergirding them and (b) potentially settle the case without the Nation's substantive involvement. In other words, only very recently did it become imperative for the Nation to bring its *own* claim in order to see its dispute with Maine over the protections afforded to its MISCA-confirmed fishing rights resolved, or to meaningfully participate in any negotiated settlement.

The particular circumstances warranting allowance of the amended pleading requested

[3] Granting the Tribe's motion will also allow it to engage in substantive negotiations with Maine to try to settle the issues; an opportunity it has not had to date.

here are all the more compelling for application of the liberal standard under Rule 15(a)(2). As the leading commentator points out, "[w]hen the omitted counterclaim is compulsory, the reasons for allowing its introduction by amendment become even more persuasive, since an omitted compulsory counterclaim cannot be asserted in subsequent cases (at least in the federal courts) and the pleader will lose the opportunity to have the claim adjudicated." 6 Wright & Miller, Federal Practice and Procedure § 1430 (3d ed.)). The counterclaim here clearly is compulsory, for it arises out of the same transaction and occurrence as the claims set out in Maine's Second Amended Complaint. *See* Exh. A.

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This litigation has proceeded for four years. The Penobscot Nation's effort to ensure that it maintains a supply of fish of sufficient quality and quantity to sustain its people and culture has continued for decades more. But after a sudden *volte face*, Maine and EPA stand poised to reach a decision on water quality standards within reservation waters absent any consideration of the Nation's sustenance fishing right and any participation by the tribal members. This Court should not allow this effort to exclude the Nation from efforts to resolve issues central to the physical and cultural survival of its people. Accordingly, the Penobscot Nation respectfully requests that the Court grant this motion and allow the Nation to file its proposed Amended Answer With Counterclaim.

Respectfully submitted this 29th day of July, 2018.

/s Kaighn Smith Jr.
Kaighn Smith Jr.
David M. Kallin
DRUMMOND WOODSUM
84 Marginal Way, Suite 600
Portland, ME 04101
Telephone: (207) 772-1941
Email: ksmith@dwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2018 I electronically filed this Motion to File Counterclaim with Memorandum of law and the exhibits referenced herein with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kaighn Smith, Jr.
Kaighn Smith, Jr.

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101
Tel: (207) 772-1941
ksmith@dwmlaw.com